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IN THE UNITED STATES DISTRICT COURT  
**FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA .  
Plaintiff, .  
vs. . Docket No. CR 10-223  
. .  
WILLIAM R. CLEMENS, . Washington, D.C.  
. Thursday, July 14, 2011  
aka Roger Clemens, .  
Defendant. . 9:30 A.M.  
. . . . . Day Seven A.M. Session

TRANSCRIPT OF JURY TRIAL  
BEFORE THE HONORABLE JUDGE REGGIE B. WALTON  
UNITED STATES DISTRICT JUDGE

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Official Court Reporter  
Room 6521, U.S. District Court  
333 Constitution Avenue, N.W.  
Washington, D.C. 20001

Proceedings recorded by machine shorthand, transcript  
produced by computer-aided transcription.

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1 P R O C E E D I N G S

2 THE COURT: Good morning. Okay. We have the  
3 witness?

4 MR. DURHAM: We do, Your Honor.

5 THE COURT: If you can sort of give me a heads up  
6 as to who the next witnesses will be, because especially in  
7 reference to DLA Piper, we have to make sure we have read  
8 back over the notes and everything to see whether any  
9 additional information has to be produced based upon what is  
10 presented during the course of the trial. So, I want to  
11 make sure my staff is up on that. So, where are we going,  
12 who will be next?

13 MR. DURHAM: Mr. Scheeler, Your Honor, will be  
14 next.

15 THE COURT: Okay.

16 [Thereupon, Jury enters courtroom at 9:35 a.m.]

17 THE COURT: Good morning.

18 THE JURORS: Good morning.

19 THE COURT: You may be seated.

20 Okay. We can get started.

21 MR. DURHAM: May I proceed, Your Honor?

22 THE COURT: Yes.

23 MR. DURHAM: Good morning.

24 THE JURORS: Good morning.

25

1 BY MR. DURHAM:

2 Q Mr. Barnett, good morning.

3 A Good morning.

4 Q Mr. Barnett, when we left off yesterday, I was asking  
5 you some questions about some testimony that Mr. Clemens had  
6 given in a deposition, a deposition which you asked some of  
7 the questions. And I was asking you some questions about  
8 the importance of certain parts of that testimony. And I'd  
9 like to begin where I left off yesterday.

10 I'm going to, this is Government's Exhibit 2-J  
11 which was admitted yesterday. I'm going to ask that we  
12 publish that and put it on the screen so we're all on the  
13 same page, both literally and figuratively.

14 Mr. Barnett, let me direct your attention to, this  
15 is page 36 of Mr. Clemens' deposition. This was read into  
16 the record yesterday. I'm not going to ask you to read the  
17 end of the record.

18 Does the topic matter deal with Mr. McNamee,  
19 Mr. Clemens' testimony concerning Mr. McNamee injecting  
20 Mr. Clemens with a substance known as Vitamin B-12?

21 A Yes, it does.

22 Q And why was, why were you interested -- first of all,  
23 did you ask this question, do you recall?

24 A I did ask this question.

25 Q Why did you ask this question?

1 A Mr. Clemens had said in, I believe in public statements  
2 prior to the deposition, that he had been injected by  
3 Mr. McNamee with B-12. Mr. McNamee's account, as described  
4 in Senator Mitchell's report, was that the injections were  
5 with steroids and human growth hormone. This question was  
6 to ask Mr. Clemens about his statements that Mr. McNamee had  
7 injected him with Vitamin B-12.

8 Q And was this an issue related to Mr. McNamee's  
9 credibility?

10 A Mr. McNamee's credibility, Mr. Clemens' credibility and  
11 fundamentally the accuracy of Senator Mitchell's findings.

12 Q Was a truthful answer to this question important to the  
13 committee?

14 A Yes, it was.

15 Q Why?

16 A The committee was trying to assess the accuracy and  
17 reliability of Senator Mitchell's reports. The testimony  
18 that Mr. McNamee had injected Mr. Clemens with B-12 was  
19 contradictory to what was in Senator Mitchell's report.

20 Q Was the answer to this question capable of influencing  
21 action by the committee?

22 A Yes, it was.

23 Q On B-12, let me just step back for a moment.

24 Did the committee at some point, between the time  
25 this deposition was taken on February 5th, 2008, and the

1 time that the public hearing was held on February 13th,  
2 2008, did the committee inquire, examine B-12?

3 A Yes, the committee did, in fact, the day before this  
4 hearing, was February 13th. On February 12th, we had a  
5 hearing looking at human growth hormone and its effect and  
6 its dangers and the laws applicable to human growth hormone  
7 and Vitamin B-12, in the committee room.

8 Q Let me direct your attention to another exhibit that's  
9 been admitted into evidence in this trial. This is  
10 Government's Exhibit 2-FF. Again, I'm not going to read the  
11 whole thing, but I do want to direct your attention,  
12 Mr. Barnett, to a passage here beginning on line ten. Is  
13 that Mr. Clemens' -- the witness, to be clear, is that  
14 Mr. Clemens?

15 A Yes, it is.

16 Q And in this is he talking about the administration of  
17 Vitamin B-12?

18 A Yes, he is.

19 Q And does he say, in part, "And the same way McNamee,  
20 after a game, and I'm passing the room, and I told him, you  
21 know, that I needed B-12 or the doctor, whatever. And  
22 there's four or five needles already lined up ready to go."

23 Do you see that passage?

24 A Yes, I do.

25 Q Was this testimony important to the committee?

1 A Yes. Yes, it was. One of the issues, it was important  
2 probably in a couple of regards. One it was important  
3 because this goes to the Senator Mitchell's findings that  
4 the injections were human growth hormone steroids, not  
5 Vitamin B-12. So that is important for the main purpose of  
6 the deposition. But prior to our inquiry, we had had the  
7 hearing the day before on B-12 and how prominent B-12 was  
8 and whether that was appropriate in sending -- B-12 doesn't  
9 have the same kind of dangers that steroids or human growth  
10 hormone does, but is that sending the appropriate message  
11 to -- is that an appropriate use of B-12. And this is  
12 conveying that B-12 is very commonly administered to giving  
13 shots or given to ballplayers.

14 Q That's what Mr. Clemens was saying?

15 A Mr. Clemens' testimony, right.

16 Q Commonly, B-12 was commonly administered?

17 A Right.

18 Q And was the answer to this question, was it capable of  
19 influencing the committee's actions?

20 A Yes, it was.

21 Q Let me move along here. Government's Exhibit 2-L,  
22 which has been admitted into evidence. This is page 42 of  
23 Mr. Clemens' deposition. There's an inquiry here and we  
24 have read this into the record, but there's an inquiry here  
25 concerning the administration of a lidocaine shot by

1 Mr. McNamee, according to Mr. Clemens' testimony. Do you  
2 see that?

3 A Yes, I do.

4 Q It's page 42. Specifically, it's line 18 on page 42.  
5 Why was this important?

6 A This was important for, first, a similar reason.  
7 Mr. Clemens' account was that Mr. McNamee had given him a  
8 lidocaine shot. Lidocaine is a pain medication, and had not  
9 given him a steroids shot. So, we were trying to understand  
10 what had actually happened. Senator Mitchell had reported  
11 this was a steroids shot, not a lidocaine shot.

12 Q And was a truthful answer to this question important to  
13 the committee?

14 A Yes, it was.

15 Q Was it capable of influencing the committee's action?

16 A Yes, it was.

17 Q Let me direct your attention to Government's Exhibit  
18 2-LL. Again, this has been admitted. This is page 173 of  
19 the deposition, and it begins on page 173 and it continues.

20 Let me, Mr. Barnett, let me do this. It might be  
21 a little bit easier because the screen only displays one  
22 page and this is a multipage document.

23 MR. DURHAM: Your Honor, may I approach the  
24 witness?

25 THE COURT: Yes.



1 BY MR. DURHAM:

2 Q Mr. Barnett, I'm going to hand you what's been marked  
3 as Government's Exhibit 2-LL, which has been admitted into  
4 evidence. It's a multipage exhibit. Just, if you could,  
5 just take a look at it and tell me whether you recognize it.  
6 Tell me where it's from.

7 A This is from a deposition of Mr. Clemens.

8 Q And what is the topic area that it deals with?

9 A This is whether Mr. Clemens had any knowledge of  
10 injection of family members using human growth hormone.

11 Q And again, we don't need to go through it line by line,  
12 but at some point, does Mr. Clemens testify under oath at  
13 his deposition that Mr. McNamee had injected his wife with  
14 the drug human growth hormone?

15 A Yes, he does.

16 Q And does Mr. Clemens outline the circumstances that he  
17 contends that that injection happened under?

18 A Yes. Yes, he does.

19 Q And do you recall, either by recollection or by looking  
20 at the exhibit, what he contended were the circumstances of  
21 Mr. McNamee injecting his wife with human growth hormone?

22 A I do have a, I do have a recollection. His account was  
23 that Mr. McNamee had injected his wife with human growth  
24 hormone without, without his knowledge. And the injection,  
25 I believe he said it had occurred in either their bedroom or

1 the bathroom next to the bedroom. She had had some adverse  
2 reactions, I believe it was circulatory symptoms. He found  
3 out about it when he arrived home. And he was upset. He  
4 had a couple of conversations with Mr. McNamee about it,  
5 saying he knew nothing about this, and was expressing his  
6 concern and his, I think he was, probably characterized  
7 himself as angry about this. I think he said he went and  
8 looked at Mr. McNamee's luggage or his belongings to see if  
9 there was any additional human growth hormone in the house.

10 Q Was this an important area of inquiry, whether or not  
11 Mr. Clemens' wife had been injected by Mr. McNamee?

12 A Well, it was important in, in several regards. Earlier  
13 in the deposition Mr. Clemens had said he had not had  
14 conversations with Mr. McNamee about human growth hormone.  
15 Here, he's saying he had conversations about human growth  
16 hormone. Earlier he had said he didn't know anything about  
17 human growth hormone; now his wife is being injected and is  
18 having adverse reactions about it, which would raise what is  
19 human growth hormone, what does it do.

20 So, there were issues that it presented about  
21 conflicts in his statement and very affirmative statements  
22 initially being in the room and listening to the deposition.  
23 There were very convincing and then there were statements  
24 that were at odds with that. More broadly, the issue for us  
25 was Senator Mitchell's findings, had Mr. Clemens used human

1 growth hormone. And this was showing human growth hormone  
2 that Mr. McNamee would have had, it would have been in his  
3 house. He would have known something about it.

4 Q Were truthful answers to the series of questions  
5 opposed in Government's Exhibit 2-LL, were they important to  
6 the committee?

7 A Yes, they were.

8 Q And were they capable of influencing the committee's  
9 actions?

10 A Yes, they were.

11 Q Let me direct your attention to another exhibit here.  
12 And I'll take that one back from you.

13 MR. DURHAM: May I, Your Honor?

14 THE COURT: Yes.

15 BY MR. DURHAM:

16 Q I'm going to direct your attention to Government's  
17 Exhibit 2-Y. Bear with me. We'll put that one on the  
18 screen. It's been admitted into evidence.

19 Do you see that exhibit on the screen in front of  
20 you now?

21 A Yes, I do.

22 Q And this particular series of questions, what is the  
23 topic area of this series of questions?

24 MR. DURHAM: I'm sorry, Mr. Hardin. It's page  
25 113.

1 MR. HARDIN: Thank you.

2 MR. DURHAM: I keep forgetting.

3 BY MR. DURHAM:

4 Q What is the topic area, sir?

5 A The topic area here was, had Mr. Clemens talked to  
6 Senator Mitchell before Senator Mitchell released his  
7 report, had he provided his account to Senator Mitchell.  
8 And Mr. Clemens' testimony was that he didn't know that  
9 Senator Mitchell wanted to speak with him. And these  
10 questions are addressing that point.

11 Q Let me look at page 114. If we could put that on the  
12 screen. Again, this is Government's Exhibit 2-Y, which has  
13 been admitted in this trial.

14 The witness here, is that Mr. Clemens speaking?

15 A Yes, that's Mr. Clemens.

16 Q And does he tell you that, "I had no idea that Senator  
17 Mitchell wanted to talk to me?"

18 A Yes, it does.

19 Q Why was that important?

20 A Well, we're trying to assess the validity of Senator  
21 Mitchell's report, whether he had reached out and tried to  
22 talk to players, whether he had made an effort to get both  
23 sides of the story, was important to whether Senator  
24 Mitchell had done a credible job as an investigator. This  
25 also, all these statements would go to the credibility or

1 truthfulness of a witness. So, if you're getting  
2 information that's not truthful or accurate, that goes to  
3 the credibility of the witness.

4 Q Was it important to the committee that, during your  
5 inquiry, was it important to the committee that Senator  
6 Mitchell had conducted himself and his investigation in a  
7 fair fashion?

8 A Yes, it was.

9 Q Were truthful answers to the series of questions, were  
10 they important to the committee?

11 A Yes, they were.

12 Q And were they capable of influencing the committee's  
13 actions?

14 A Yes, they were.

15 Q I want to direct your attention to another exhibit.

16 THE COURT: Approach for a minute.

17 [Bench conference.]

18 THE COURT: Are we going to go through every one  
19 of Mr. Clemens' statements?

20 MR. DURHAM: No, Your Honor, we're almost done.  
21 We're almost done with the depositions. There are hearing  
22 statements that they're not as long, obviously. But we're  
23 almost done with the depositions.

24 THE COURT: Okay.

25 [Open court.]

1 BY MR. DURHAM:

2 Q Let me direct your attention to one other passage in  
3 the deposition. That is Government's Exhibit 2-D, which has  
4 been admitted into evidence in this trial. We'll put on the  
5 screen page 16.

6 Do you see this passage?

7 A Yes, I do.

8 Q And you asked Mr. Clemens whether, line 13, "And could  
9 you have been at his," and you're speaking about  
10 Mr. Canseco, "at his house during this time period, June 8th  
11 through the 10th, 1998." And his answer is no.

12 Do you see that?

13 A Yes, I do.

14 Q Did you ask that question?

15 A Yes, I did.

16 Q Now, I don't mean to talk out of school here, but what  
17 possible relevance is it whether Mr. Clemens is at a man's  
18 house in June of 1998? Why would you ask that type of  
19 question?

20 A In this part of the deposition, my recollection is, as  
21 I was going through, I think pretty systematically paragraph  
22 by paragraph in Senator Mitchell's report that related to  
23 Mr. Clemens, and asking Mr. Clemens whether he agreed or  
24 disagreed with what Senator Mitchell had reported, Senator  
25 Mitchell had reported that Mr. McNamee saw Mr. Clemens at

1 Mr. Canseco's house at a party in June of 1998 in Florida.  
2 And Mr. Clemens denied that he was, he was there.

3 As the, I think it occurs later in the deposition,  
4 but it becomes actually a point that Mr. Clemens and his  
5 counsel asserted with a lot of vehemence that this was an  
6 inaccurate finding in Senator Mitchell's report, and the  
7 committee should be looking at this because it shows how  
8 inadequate a job Senator Mitchell had done. I think at one  
9 point they said they used a horrible methodology in the  
10 report, and it was, a lot of that was premised on the  
11 inaccuracy of this, of this statement in Senator Mitchell's  
12 report.

13 Q So, let me make sure I understand this. There's a  
14 passage in Senator Mitchell's report that deals with whether  
15 Mr. Clemens is at Mr. Canseco's house in June of 1998,  
16 correct?

17 A Yes.

18 Q And you get to the deposition and it's Mr. Clemens and  
19 his lawyers that make an issue of this passage in Senator  
20 Mitchell's report?

21 A My recollection at one point, Mr. Clemens' attorney,  
22 Rusty Hardin, said this was the place it all, according to  
23 the Mitchell Report, it all began, was in Jose Canseco's  
24 house. Mr. Clemens wasn't there, the whole house of cards  
25 collapses because this fact is inaccurate. And they then

1 said they had additional information that they wanted to  
2 share with us; receipts showing that Mr. Clemens was on a  
3 golf course, not at the house at the time, the play-by-play  
4 at the baseball game the next day, when the announcers  
5 talked about Mr. Clemens not being at the house at this  
6 time. So, they were making an issue of it.

7           One thing I did in the deposition on several  
8 occasions because you had a statement where Mr. Clemens is  
9 saying one thing to Mr. McNamee, was were there points here  
10 where as investigators, we could go and try to determine who  
11 was right or who was wrong. It wasn't just one person  
12 versus another. And this was an area that Mr. Clemens and  
13 his counsel said was that kind of a situation and we should  
14 really look at this.

15 Q    Were you ever -- well, did you receive the evidence and  
16 the information that Mr. Clemens' lawyers provided to you on  
17 this subject?

18 A    Yes, we did.

19 Q    Were you ever able to achieve complete closure on this  
20 issue; that is, whether Mr. Clemens was or wasn't at  
21 Mr. Canseco's house on June 9th, 1998?

22 A    I'm not sure what you mean by complete closure.

23 Q    Were you ever able to -- well, let me ask you this:  
24 When you get to the hearing the next week, February 13th,  
25 2008, is that issue still an area of inquiry that the



1 members are asking about?

2 A Yes, it is. We ended up actually talking to multiple  
3 people about, about that issue and having statements on both  
4 sides of the issue.

5 Q And did members at the hearing, did the members at the  
6 public hearing ask questions about this subject, if you  
7 recall?

8 A Yes, that's my recollection.

9 Q Which leads us to the next area of inquiry here. Let  
10 me direct your attention to February 13th, 2008. Was there  
11 a public hearing? We talked about the private depositions.  
12 Was there a public hearing?

13 A Yes, there was.

14 Q And what was the title of that hearing, do you recall?

15 A I think it was -- it would be helpful to refresh my  
16 recollection so I can get it exactly right.

17 Q We'll do that with an exhibit that's been admitted. If  
18 you'll bear with us for a moment, please.

19 This is Government's Exhibit Number -- sorry.  
20 We'll refer to an exhibit number. It's been admitted into  
21 evidence. Yes, it's Government's Exhibit 3-A.

22 A The hearing title is The Mitchell Report, The Illegal  
23 Use of Steroids in Major League Baseball, Day Two. The Day  
24 One would have been the hearing the month before on January  
25 15th, when we had Senator Mitchell and Commissioner Selig

1 and Donald Fehr, Fehr, from the Player's Association.

2 Q Why did the committee hold a public hearing after they  
3 took these depositions?

4 A The, the deposition provide the committee with a lot of  
5 information. You have the account of the witnesses now and  
6 under oath. We also had interviews which weren't under  
7 oath. We had documents we had assessed. And now the  
8 individuals come before the committee, the members get to  
9 see them. The members get to ask questions. The members  
10 get to assess their credibility. You -- when we had taken  
11 Mr. Clemens' deposition, we hadn't taken Mr. McNamee's yet.  
12 So, you learn more information there. You can ask about  
13 things you learn later. You can ask Mr. Clemens. And  
14 really all the way up until even the evening before the  
15 hearing, we were still getting new information. So, it's a  
16 chance to ask about that information.

17 Q Was Mr. Clemens required to attend the public hearing?

18 A It was a voluntary appearance. There was no subpoena.

19 Q Was he ever issued a subpoena?

20 A No, there was no subpoena issued to Mr. Clemens.

21 Q Did the committee -- was the committee willing to hear  
22 from Mr. Clemens?

23 A Yes.

24 Q Now, were there other individuals who testified at the  
25 public hearing?

1 A Yes, Mr. McNamee and Mr. Scheeler testified.

2 Q Who is Mr. Scheeler?

3 A He was the, a counsel who worked with Senator Mitchell  
4 in preparing Senator Mitchell's report.

5 Q Why did the committee want to hear from Mr. Scheeler?

6 A He was a representative of Senator Mitchell and Senator  
7 Mitchell's report. And the hearing was about the, about  
8 Senator Mitchell's report and whether it was accurate in  
9 the, an accurate report.

10 Q You said Mr. McNamee testified?

11 A Mr. McNamee testified, right.

12 Q Why did the committee want to hear from Mr. McNamee?

13 A Mr. McNamee, Senator Mitchell's report relied  
14 extensively on Mr. McNamee's statements. Mr. McNamee had a  
15 very different account than, than Mr. Clemens did.

16 Q Was Mr. McNamee given -- well, first of all, was  
17 Mr. McNamee invited, subpoenaed? How is it that  
18 Mr. McNamee --

19 A He was there voluntarily also.

20 Q Was he given any type of immunity or free passes by  
21 Congress for his testimony?

22 A No, he was not.

23 Q And was he under the same obligation to tell the truth  
24 as Mr. Scheeler and Mr. Clemens?

25 A Yes. And he was also sworn in, just as they were.

1 Q Let me show you what's been marked as Government's  
2 Exhibit 3-A.

3 MR. DURHAM: May I approach the witness, Your  
4 Honor?

5 THE COURT: Yes.

6 BY MR. DURHAM:

7 Q Mr. Barnett, I'll show you what's been marked as  
8 Government's Exhibit 3-A for identification. That's not  
9 been admitted yet. Please take a look at that document with  
10 an eye toward telling us whether you recognize it, whether  
11 you've seen it before?

12 A I do recognize it. It's the official transcript of  
13 our, official report of our hearing.

14 MR. DURHAM: And if I can approach the witness,  
15 again?

16 THE COURT: Yes.

17 BY MR. DURHAM:

18 Q I'm going to show you what's been marked for  
19 identification as Government's Exhibit 3-B. I'll ask you to  
20 take a look at that. The record should reflect it's two DVD  
21 disks.

22 Have you seen the recorded version -- the video  
23 version of this hearing?

24 A I've seen parts of it, but not in its entirety.

25 Q You've seen excerpts of it?

1 A Yes.

2 Q And the excerpts, to be clear, you saw, I showed you  
3 those excerpts several weeks ago, correct?

4 A That's correct.

5 Q And referred them to -- referred to them by Exhibit  
6 Numbers 3-B1, 3-B2, 3-B3, 3-B4, 3-B5, 3-B6 and 3-B7; is that  
7 correct?

8 A That's correct.

9 Q And those excerpts of the video that I showed you and  
10 that you viewed, are they true and accurate excerpts of the  
11 hearing that occurred on February 13th, 2008?

12 A Yes. Yes, they are.

13 Q And did you also look at the --

14 THE COURT: Did you attend the hearing?

15 THE WITNESS: Yes, sir.

16 THE COURT: Okay.

17 BY MR. DURHAM:

18 Q Did you also look at the same time at certain  
19 transcript excerpts from the official transcript? You have  
20 Government's Exhibit 3-A. Why don't you identify  
21 Government's Exhibit 3-A for us.

22 A This is the official report of the hearing that we held  
23 on February 13th, 2008. I read the title before, it's the  
24 Mitchell Report, The Illegal Use of Steroids in Major League  
25 Baseball, Day Two.

1 Q And to the best of your knowledge, is that a fair and  
2 accurate transcription of the events that happened on  
3 February 13th, 2008 --

4 A Yes.

5 Q -- for the House Committee on Oversight and Government  
6 Reform?

7 A Yes, it is.

8 Q And are there excerpts that correspond to the video  
9 clips that I just described?

10 A Yes.

11 Q And would they be Government Exhibits 3-A1, 3-A2, 3-A3,  
12 3-A4, 3-A5, 3-A6 and 3-A7, to your knowledge?

13 A I believe so. I'm not sure I remember the exhibit  
14 numbers.

15 MR. DURHAM: May I approach, Your Honor?

16 THE COURT: Yes.

17 BY MR. DURHAM:

18 Q Go ahead and take a look at those items, please.

19 A [Witness complied.] Yes, those correspond to the video  
20 excerpts you showed me.

21 MR. DURHAM: Your Honor, at this time the  
22 government will formally move into evidence the following  
23 exhibits: Government's Exhibits, 3-A1, 3-B1, 3-A2, 3-B2,  
24 3-A3, 3-B3, 3-A4, 3-B4, 3-A5, 3-B5, 3-A6, 3-B6 and 3-A7,  
25 3-B7.

1 THE COURT: Any objection?

2 MR. HARDIN: Can I have just a second, Your Honor?

3 No objection, Your Honor.

4 THE COURT: Very well. They'll be admitted  
5 without objection.

6 [Thereupon, Government's Exhibit Nos. 3-A1, 3-B1,  
7 3-A2, 3-B2, 3-A3, 3-B3, 3-A4, 3-B4, 3-A5, 3-B5,  
8 3-A6, 3-B6 and 3-A7, 3-B7 were admitted into  
9 evidence.]

10 BY MR. DURHAM:

11 Q I'm sorry, you said you attended the hearing?

12 A Yes, I did.

13 Q And do you know, at the beginning of the hearing were  
14 the witnesses sworn in?

15 A Yes, they were.

16 Q I'm going to show you what's been marked for  
17 identification as Government's Exhibit 14. I don't believe  
18 we've admitted that yet. Fourteen. It's a photograph. And  
19 I'll ask you to take a look at the photograph that appears  
20 in the screen in front of you, sir.

21 MR. PITTARD: Your Honor, if I can get a copy?

22 MR. DURHAM: I'm sorry, my apologies. Fourteen-A,  
23 14-B and 14-C, it's actually three photographs. I stand  
24 corrected.

25

1 BY MR. DURHAM:

2 Q These items have not been admitted. They'll appear on  
3 your screen. I'll ask you to take a look at them, sir, with  
4 an eye toward telling us whether you recognize them. Go  
5 ahead and take a look at those items, please.

6 A [Witness complied.]

7 Q Do you recognize those photographs?

8 A Yes.

9 Q What are they?

10 A These are three different shots of our hearing with  
11 Mr. Clemens, Mr. Scheeler and Mr. McNamee, sworn in by  
12 Chairman Waxman.

13 Q And do they fairly and accurately depict what you  
14 observed personally that day?

15 A Yes, they do.

16 MR. DURHAM: Your Honor, at this time we'll  
17 formally move into evidence Government's Exhibits 14-A, 14-B  
18 and 14-C.

19 MR. HARDIN: No objection.

20 THE COURT: Admitted.

21 [Thereupon, Government's Exhibit Nos. 14-A, 14-B  
22 and 14-C were admitted into evidence.]

23 MR. DURHAM: And we'll ask for permission to  
24 publish, Your Honor?

25 THE COURT: Very well.



1 BY MR. DURHAM:

2 Q We'll put these on the screen briefly. If you could  
3 describe, first, 14-A?

4 A This is a picture, going from the right, Mr. Clemens  
5 then Mr. Scheeler and then Mr. McNamee being administered  
6 the oath.

7 Q And we'll go to 14-B?

8 A That's the same shot from a little more distant angle.

9 Q The gentlemen in the foreground with his right-hand  
10 raised, do you know that person?

11 A On the right as you're looking at the picture is  
12 Mr. Clemens, then Mr. Scheeler in the middle and then  
13 Mr. McNamee on the left.

14 Q I'm sorry, actually I can do this, it's easier  
15 [indicating]. That gentleman?

16 A That's Chairman Waxman.

17 Q Chairman of the committee?

18 A Yes.

19 Q And 14-C, please, same?

20 A Same.

21 Q Let me direct your attention. I'm going to play a  
22 video clip that you have identified. You observed the oath  
23 being administered to these individuals?

24 A Yes.

25 Q In Exhibit 3-B7, which has now been admitted, is that

1 the administration of the oath, to your knowledge? 3B-7,  
2 it's a video clip. I'm sorry, I don't mean to confuse you.  
3 Yes, that's okay.

4 A I haven't seen anything.

5 Q Understood. It's easier -- well, it's been admitted.

6 A You did show me a video clip of the oath being  
7 administered.

8 Q Let's do it this way: It's admitted into evidence.  
9 Let's cue it up and we'll run it.

10 [Video played.]

11 BY MR. DURHAM:

12 Q Does the law authorize an administration of the oath to  
13 witnesses at a hearing before the committee?

14 A Yes, it does.

15 Q And did Chairman Waxman have the authority to  
16 administer that oath?

17 A Yes, he did.

18 Q And was the hearing a proceeding in which the oath was  
19 authorized by a House rule?

20 A Yes, it was.

21 Q There were members of Congress, members of the  
22 committee that attended the hearing?

23 A Yes, there were.

24 Q I'm going to show you a video clip. It's also been  
25 admitted into evidence. First, let me ask you, the exhibits

1 in front of you, Government's Exhibit 3-A1. It's a  
2 transcript excerpt from the hearing. Go ahead and take a  
3 look at that, if you could. And we'll put that on the  
4 screen briefly. It has been admitted.

5           You see that testimony? It's two sentences. Do  
6 you see that, sir?

7 A     I do.

8 Q     And who's making that statement?

9 A     Mr. Clemens.

10 Q    All right. And if we could now play Government's  
11 Exhibit 3-B1, please.

12           [Video played.]

13 BY MR. DURHAM:

14 Q    Was a truthful answer to this question or this -- was a  
15 truthful testimony, was it important to the committee on  
16 this subject?

17 A    Yes, it was.

18 Q    Why?

19 A    It was, Senator Mitchell's report had found that he had  
20 taken steroids and human growth hormone. The hearing was  
21 trying to assess whether Senator Mitchell had done an  
22 accurate job or not. This was testimony directly contrary  
23 to Senator Mitchell's findings.

24 Q    Did the answer to this question have the capacity to  
25 influence the committee?

1 A Yes, it did.

2 Q How?

3 A The committee wanted to know could it rely on the  
4 investigatory work of Senator Mitchell, had Senator Mitchell  
5 done a thorough job with the committee, or would another  
6 body need to investigate to do a thorough investigation of  
7 Major League Baseball. And the committee, from a policy  
8 perspective, wanted to understand could it rely on Senator  
9 Mitchell's recommendations. And the accuracy and the  
10 validity of Senator Mitchell's finding were the foundation  
11 for his recommendations.

12 Q And was this equally true with respect to Mr. Clemens'  
13 answer for human growth hormone as it was for anabolic  
14 steroids?

15 A Yes. Yes, it was.

16 Q Let me direct your attention to another excerpt of the  
17 hearing. This is Government's Exhibit 3-A4 that's been  
18 admitted. And we'll put it on the screen.

19 [Video played.]

20 BY MR. DURHAM:

21 Q Was truthful testimony -- well, first of all, why was  
22 this an area of inquiry in the first place?

23 A This was, again, this was, Mr. Clemens' account was  
24 Mr. McNamee had injected him with lidocaine and B-12, not  
25 with steroids and human growth hormone. Senator Mitchell

1 had found that Mr. McNamee had injected Mr. Clemens with  
2 human growth hormone steroids. So this was one of the  
3 points in contention that the committee was trying to  
4 understand, was Senator Mitchell's report accurate or  
5 inaccurate.

6 Q Was a truthful answer to this question important to the  
7 committee?

8 A Yes, it was.

9 Q And did the answer have a capacity to influence the  
10 committee in its official action?

11 A Yes, it did.

12 Q How so?

13 A The -- again, I think it's in the same two categories,  
14 investigative and policy. On the investigative side, the  
15 committee had asked Major League Baseball to do a thorough  
16 and independent investigation. Baseball had retained  
17 Senator Mitchell, senator Mitchell released a report, now  
18 we're trying to assess had -- was this report the kind of  
19 thorough, accurate, comprehensive investigation the  
20 committee had requested.

21 On the policy side, there was a question whether  
22 Senator Mitchell had made the appropriate recommendations.  
23 The foundation for those recommendations was his  
24 investigation. The committee or many members on the  
25 committee had a -- members on the committee had a concern,

1 could baseball regulate itself or was Congressional action  
2 necessary? Baseball had retained Senator Mitchell, done an  
3 investigation and made recommendations. And that was -- one  
4 of the issues was were they accurate? Was Senator  
5 Mitchell's report accurate? Was his recommendations good?  
6 Was baseball going to implement those recommendations?

7 Q And that applies with full force to Mr. Clemens'  
8 denials that he ever used human growth hormone and anabolic  
9 steroids; is that correct?

10 A It did because that was one of Senator Mitchell's  
11 findings in his report.

12 Q I'm going to show you another piece of this hearing  
13 transcript. And that is Government's Exhibit 3-A6. One  
14 moment. Yes, 3-A6. Sorry, let me just -- yes, sir, 3-A6.

15 Take a look at the transcript excerpt that you see  
16 in front of you for a moment.

17 A Okay.

18 Q And then we're going to ask -- we're going to run 3-B6  
19 with the Court's permission. It's a video clip.

20 THE COURT: Very well.

21 [Video played.]

22 BY MR. DURHAM:

23 Q This excerpt that we just saw, Mr. Barnett, was a  
24 truthful answer important to the committee on this topic  
25 area?

1 A Yes, it was.

2 Q And did it have the capacity to influence the committee  
3 in its official action?

4 A Yes, it did.

5 Q And for the reasons that you've stated previously?

6 A Yes, that's correct.

7 Q I'm going to show you another excerpt. We have a  
8 couple more here. Let me direct your attention to  
9 Government's Exhibit 3-A2, which has been admitted, which is  
10 the transcript -- I'm sorry, let me back up just a moment  
11 and identify some speakers.

12 The gentleman who is asking the questions in the  
13 last round, do you recognize him?

14 A That's Congressman Mica, a congressman from Florida. A  
15 Republican congressman from Florida. Mica, M-I-C-A.

16 Q And in the first clip, was that Representative Davis?

17 A That was Tom Davis. He's the ranking member. He was  
18 the Senior Republican on the committee.

19 Q Let me put up on the screen, if we could, Government's  
20 Exhibit 3-A2. It's the excerpt. This is page 86 of the  
21 official hearing transcript. This is multipage. You have  
22 3-A2 in front of you, Mr. Barnett. I just want you to  
23 confirm that it's an exchange, a question-and-answer  
24 exchange between a member and Mr. Clemens?

25 A Yes, it is. The member in this case is Mr. Elijah

1 Cummings. He's a Democrat from Baltimore.

2 Q All right. Why don't we take a look here at  
3 Government's Exhibit 3-B2, which has been admitted into  
4 evidence.

5 [Video played.]

6 THE COURT: Approach for a moment.

7 [Bench conference.]

8 THE COURT: I hate to raise with experience,  
9 counsel, testimony that's coming in without objection, but  
10 we have talked about this and there's some issues. But if  
11 you're not objecting, I just want to get on the record that  
12 you've made a tactical decision.

13 MR. HARDIN: No, here's my problem, Judge: I've  
14 got a visual to the jury of a document that we did not  
15 object to being in evidence, which was the hearing. I don't  
16 know quite what to do in front of the jury. I object to all  
17 of this. It does violate the motion in limine.

18 But the problem I have is, is I'd have to stand up  
19 in front of the jury, I'll just have to deal with it on  
20 cross later. I mean, it's not a conscious, at least.  
21 They're running up there talking about other people.  
22 Mr. Cummings was the most aggressive inquisitor during the  
23 whole time. What he's playing now is just simply a  
24 cross-examination by Representative Cummings of Mr. Clemens.

25 And my dilemma is, standing up in front of the



1 jury objecting to something that we agreed to allow into  
2 evidence. He admitted it, it is true. He admitted the  
3 hearing report, and my objection is to portions of it. Now,  
4 after the entire report has been admitted, my dilemma is, I  
5 didn't know how in good faith I could stand up in front of  
6 the Court and object to portions that I hadn't objected when  
7 he put the entire thing in. That's my dilemma. And quite  
8 frankly, when we get the exhibits, it's late. I haven't had  
9 time to go over it.

10 MR. DURHAM: Well, but these exhibits, these  
11 admissions have been turned, this video clip and this  
12 transcript was turned over in early May.

13 THE COURT: I understand. But what is being  
14 played now is in total contradiction to what I had ruled in  
15 the motion in limine.

16 MR. HARDIN: Exactly.

17 THE COURT: So, you know, this should not have  
18 been played, unless counsel believes that for some reason  
19 the landscape had changed and therefore there was a reason  
20 for me to reach a different decision.

21 MR. HARDIN: The landscape has not changed.

22 MR. DURHAM: This is part of the Congressman's  
23 question to Mr. Clemens. If this has been raised before,  
24 then we could --

25 THE COURT: It had been raised, maybe not

1 specifically in reference to this clip, but it had been  
2 raised as to whether or not this information coming from the  
3 wife, Mr. Pettitte's wife, could come in. And I had said  
4 no. Obviously, something could have occurred that could  
5 open the door to make it come in, but at this point I  
6 haven't seen that door opened.

7 MR. ATTANASIO: May I just say for the record that  
8 when the Court makes a ruling on a motion in limine, it's  
9 incumbent on the prosecutor to then redact or alter his  
10 exhibits, not hand them to counsel and tell us, I'm  
11 admitting 3-A through 3-H and expect counsel for the defense  
12 to read them in 30 seconds and then move them in. They  
13 should have been changed.

14 THE COURT: We'll take a short break.

15 [Thereupon, Jury exits courtroom at 10:35 a.m.]

16 THE COURT: While they're out, let me just take  
17 five minutes.

18 [Thereupon, recess taken at 10:36 a.m., resuming  
19 at 10:40 a.m.]

20 MR. HARDIN: If I may pursue the point that  
21 Mr. Attanasio was making before the bench. The dilemma that  
22 the way they went about this is, I think we had every right  
23 to assume that after the Court rules a certain way in motion  
24 in limine, that the state will -- the government rather will  
25 adjust their exhibits to comply with the motion in limine.

1 When we just went through this admission, it is true, they  
2 offered the transcript and they did it with all of these  
3 different sections, the entire transcript. We had about, I  
4 could have taken longer, certainly the Court didn't restrict  
5 me. But it is perfectly proper for the defense to assume  
6 that they have altered exhibits to comply with the motion in  
7 limine. That was the assumption I made.

8 Then, when Congressman Cummings' comments and  
9 questions and basically cross-examination was going on, the  
10 dilemma I had is standing up in front of the jury as if I am  
11 trying to hide legitimate questions that the jury has to  
12 assume is there for a document that is in evidence.

13 THE COURT: Is there anything that has come out up  
14 to this point before the questioning was about to start  
15 about Mr. Pettitte's wife, that you think should not be  
16 appropriately before the jury? I did not see a problem with  
17 what Mr. Clemens was saying about his purported use.  
18 Obviously, the statements that Mr. Pettitte made, he's  
19 obviously going to testify about that. I mean --

20 MR. HARDIN: I think we can deal with that.  
21 You're right, Your Honor. The statements about  
22 Mr. Pettitte. But when he starts talking about  
23 Mr. Pettitte's affidavit, of course a totally hearsay  
24 document, and then starts talking about Mr. Pettitte's  
25 wife's affidavit, which the Court has clearly said, has

1 ruled on those matters.

2 THE COURT: I mean, I guess the concern I had  
3 about Mr. Pettitte, the questions being asked about  
4 Mr. Pettitte, is now we do have before the jury Congressman  
5 Cummings' assessment of Mr. Pettitte's credibility, which  
6 obviously one person, even if they were here as a witness,  
7 can't opine on the credibility of another witness. That's  
8 the prerogative of the jury.

9 But there wasn't an objection, I didn't say  
10 anything. But I clearly had obviously ruled in reference to  
11 Mr. Pettitte's wife. And the fact that information about  
12 what Mr. Pettitte said to his wife could not come in unless  
13 certain prerequisites were established, which have not at  
14 this point been demonstrated.

15 MR. HARDIN: And they never will be. We are not  
16 going to ever be challenging that Mr. Pettitte believed he  
17 said that.

18 THE COURT: Well, government counsel, I am  
19 troubled by, I mean, now this actual substance hasn't come  
20 out, although the clear implication from what has come out  
21 is that something was said by Mr. Pettitte to his wife,  
22 consistent with what is already before the jury. And I had  
23 made a ruling that statements that Mr. Pettitte allegedly  
24 made to his wife could not come in unless certain  
25 prerequisites were established. And I'm perplexed, having

1 made that ruling, as to why these exhibits were not altered  
2 to ensure that there was not a violation of my order. I  
3 don't particularly like making rulings and lawyers not  
4 abiding by those rulings.

5 MR. DURHAM: There was no intention to run afoul  
6 of any Court ruling, Your Honor.

7 THE COURT: Well, how would this come in?

8 MR. DURHAM: Well, these items were delivered to  
9 the defense two months ago, these clips. This is part --

10 THE COURT: It's not their prerogative to say,  
11 come back to you after I've made a ruling and say, okay, and  
12 based on the Court's ruling, you've got to make these  
13 alterations of your exhibits. That's the government's  
14 responsibility.

15 MR. HARDIN: And if I may add, Your Honor, the  
16 problem with that is, is that this exhibit now, I'm sure  
17 we're going to find has not been redacted to take out  
18 references to Mr. Knoblauch and to others. And that, and  
19 additionally, I'm going to guess, they have not redacted to  
20 comply with the Court's order in that regard either. I  
21 suspect, maybe they have. I assumed they had when I didn't  
22 object to the introduction, but now I think we're on notice  
23 that there may not have been redactions there either.  
24 Perhaps there have been.

25 THE COURT: Well, how do we proceed? I mean, I

1 think this clearly runs afoul of my pretrial rulings.

2 MR. DURHAM: Your Honor, let me ensure that there  
3 are no other references to Mrs. Pettitte or any other  
4 players. This was within the context of a question that was  
5 being posed Representative Cummings, which obviously is not  
6 evidence at all.

7 MR. HARDIN: Well, let me mention, the problem we  
8 have is, is this is the second, so there must be a total  
9 misunderstanding on the government's part as to their  
10 obligations, because this happened during opening statement,  
11 too. I had to object during opening statement to a  
12 mentioning of other players. The Court ruled and reminded  
13 them that that was a violation of the motion in limine.

14 Now we're here this second time. As far as where  
15 do we go from here, the best I can suggest is the Court's  
16 admonition to the jury that they are to disregard. I'll  
17 have to figure out right now off the top of my head, I'm not  
18 really ready, I have to figure out what kind of instruction  
19 we would like to ask from the Court. I don't know any other  
20 solution at this stage.

21 MR. DURHAM: Your Honor, I don't want to revisit  
22 last week's, the discussion. But I can produce a  
23 transcript. When I asked the Court, I don't want to run  
24 afoul of the Court's ruling, can the government mention  
25 other players with respect to and in connection with why

1 they used the drug as opposed to whom they got it from.  
2 There is no bad faith on the part of the government here in  
3 trying to prove this case.

4 THE COURT: Well, you know, as I said, maybe there  
5 was some misunderstanding of what my ruling was. But I  
6 thought I had made it clear that what these other players  
7 did as it related to their involvement with Mr. McNamee and  
8 their knowledge that they were getting steroids and HGH from  
9 Mr. McNamee, would have no bearing whatsoever on what  
10 Mr. Clemens' knowledge as to what he was getting from  
11 Mr. McNamee. Because as I said, you can't impute their  
12 knowledge of what they were receiving to Mr. Clemens. And  
13 that's the heart of his defense, that he did not know that  
14 he was receiving, assuming he did receive, unbeknownst to  
15 him, anything other than B-12 and lidocaine.

16 So, I thought I had made it perfectly clear that I  
17 didn't see, absent something else evolving during the  
18 course of this trial, that would in some way make the  
19 testimony from these other ballplayers about what they had  
20 used relevant.

21 Now, obviously in reference to Mr. Pettitte, in  
22 light of the fact that he says that Mr. Clemens told him  
23 that he used these substances, I think it's probably  
24 inevitable that his use as it related to Mr. McNamee is  
25 going to be something that's going to come before this jury.

1 But in reference to these other players, who there's no  
2 evidence that they had discussions with Mr. Clemens or  
3 anything of that nature that would suggest that somehow  
4 knowledge could be imputed, based upon their situation, to  
5 Mr. Clemens. So, I thought I had made it perfectly clear  
6 that absent something else happening during this trial, that  
7 that testimony was not going to be relevant.

8 MR. DURHAM: Yes. I think what the Court's  
9 ruling, and again, I need to look at the transcript on that,  
10 Your Honor. But I remember that I got up to ask for a  
11 clarification on the issue. And what came up in the opening  
12 statement was the statement was not that Mr. McNamee  
13 delivered drugs to these other players, but why these other  
14 players chose to use the drugs in the first place.

15 THE COURT: But again, unless there's evidence  
16 that they talked to Mr. Clemens and therefore implanted in  
17 his mind the feeling that well, they were benefiting in a  
18 certain way, and therefore, based upon their experiences,  
19 that would somehow maybe have provided an incentive for  
20 Mr. Clemens to also use. Absent that, the fact that they  
21 said these drugs had these impact on them, I don't see how  
22 that somehow makes it relevant to these proceedings.

23 MR. DURHAM: I understand. But I just want the  
24 Court to understand that we didn't run afoul of the Court's  
25 ruling within the context of the opening statement. And



1 again, I want to refer back to the transcript.

2 THE COURT: Well, again, I thought it did run  
3 afoul of my ruling. I thought I had made it clear that  
4 information about these other players, absent other things  
5 happening in the trial that would open the door, that that  
6 information was not going to be admissible in this case.

7 But now we've got this problem. And I think  
8 clearly this information about Pettitte's wife runs totally  
9 afoul of what I said could come in in reference to her. And  
10 now we've got this before the jury. The clear implication  
11 is that Andy Pettitte said to this wife something consistent  
12 with what he says Mr. Clemens told him. So now we've got a  
13 prior inconsistent statement that otherwise doesn't qualify  
14 for admissibility, at least on the current record, before  
15 this jury.

16 I'll take a short break for counsel to think about  
17 how you want to proceed. Take ten minutes.

18 [Thereupon, recess taken at 10:49 a.m., resuming  
19 at 11:00 a.m..]

20 THE COURT: Mr. Hardin?

21 MR. HARDIN: Your Honor, first, depending on the  
22 Court's ruling, we'll have a notice objection. But I think  
23 reluctantly, we're going to have to move for a mistrial  
24 because of the prejudicial nature of what's happened in  
25 front of the jury. For the record, I'll point out what was

1 just relayed to me while we were up at the stand. During  
2 the bench colloquy that, quote, stayed up there frozen by  
3 the government's people on the TV. And I'm not alleging bad  
4 faith with her, she doesn't know what we were talking about  
5 up there. But the entire time we were before the bench on  
6 it, Congressman Cummings' statements about Laura Pettitte  
7 were on the screen for the jury to be looking at.

8 THE COURT: Did it specifically say on the screen  
9 what Andy Pettitte said to his wife?

10 MR. HARDIN: I'd have to check and see because we  
11 were standing up -- it was that last portion.

12 MR. BUTLER: Yes, it did, Your Honor.

13 THE COURT: I'd have to see it again.

14 MR. HARDIN: It would be the one that was frozen.  
15 If you could bring it back up? It would be whatever was  
16 there at the time the Court called us to the front.

17 MR. BUTLER: If we could have the Court's  
18 indulgence. It will take a moment.

19 [Brief pause.]

20 THE COURT: It's on the screen. You can just read  
21 into the record what is on the screen now.

22 MR. HARDIN: Thank you, Your Honor. It would be  
23 on the transcript, the recorded portion where it reads  
24 1031.5, at 1031.5 of that day. And it's a seven-line, looks  
25 like six on my screen here, but I think it picks up on seven

1 lines? Yes. And in light of that, Your Honor, I  
2 reluctantly, I would like this jury -- I know the cost --

3 THE COURT: Why don't you read it into the record,  
4 exactly what's on the screen.

5 MR. HARDIN: That would probably be -- thank you,  
6 Judge. Let me read to you what his wife said in her  
7 affidavit: "I, Laura Pettitte, do depose and state in 1999  
8 or 2000 Andy told me he had a conversation with Roger  
9 Clemens in which Roger admitted to him using human growth  
10 hormones. Mr. Clemens, once again, I remind you, you are  
11 under oath. You have said your conversation with  
12 Mr. Pettitte never happened. If that was true, why would  
13 Laura Pettitte remember Andy telling her about the --"

14 I believe that is when the Court called us to the  
15 bench. And my point is, I think we probably for a couple of  
16 minutes, two or three minutes were before the bench, the  
17 Court remembers about how long it would be, and discussing  
18 this. And during that time, this exhibit that I just read  
19 was on display in front of the jury.

20 THE COURT: Any response from the government to  
21 the motion for a mistrial?

22 MR. DURHAM: We object, Your Honor. This exhibit,  
23 these exhibits were admitted into trial without objection.  
24 They had been previously --

25 THE COURT: But, counsel, it overlooks -- I

1 understand that. And what should have happened is that once  
2 I made my ruling, government counsel should have redacted  
3 the documents to reflect those documents in light of my  
4 ruling. There should have been a request by the defense for  
5 copies of these new exhibits which counsel as I understand  
6 had at least the prior documents, prior to my observation in  
7 limine ruling. Once I made those rulings, I agree, counsel  
8 should have made a request for that information to make sure  
9 that whatever the government was going to use was in  
10 compliance with my ruling. But in the first instance, the  
11 obligation of doctoring those exhibits to make sure that my  
12 ruling was not, was not violated rests with the government.

13 MR. DURHAM: We're not evading any responsibility,  
14 Your Honor.

15 THE COURT: Why wasn't this altered in order to  
16 ensure that this information that I had ruled could not come  
17 in would not be played to this jury and shown to them?

18 MR. DURHAM: This exhibit is in the context of a  
19 question that is asked to Mr. Clemens specifically.

20 THE COURT: That doesn't override my ruling.

21 MR. DURHAM: I understand.

22 MR. ATTANASIO: May I be heard on the issue of  
23 marked exhibits, Your Honor?

24 THE COURT: Yes.

25 MR. ATTANASIO: Time line: Motions in limine

1 hearing, July 5th, the day after the holiday. After that  
2 date, several times, including on July 11th, and I invite  
3 counsel to disagree with me if he does, but on as recently  
4 as July 11th at 3:11 p.m., is when we finally got the  
5 government's marked exhibits.

6           It's not that we've had them for weeks and weeks  
7 and weeks. We never got them despite repeated requests,  
8 please give us your marked exhibits, and I don't think  
9 government counsel will disagree, until the 11th Hour. And  
10 then they moved them in rapidly this morning, and then  
11 suddenly we see it on the screen.

12           So, post Your Honor's rulings, we asked for new  
13 exhibits. So, in relation to Your Honor's last comment, we  
14 had asked for those repeatedly. And Mr. Durham apologized  
15 and cited resource constrictions at the U.S. Attorney's  
16 office for why we didn't have them. We understood, under  
17 Your Honor's general order, we were to have them three days  
18 before the trial. So, we have been pestering, I think  
19 that's a fair verb, probably how they would characterize my  
20 e-mails, we have been pestering them for marked exhibits in  
21 the wake of Your Honor's ruling before and since.

22           THE COURT: The other thing that bothers me is  
23 that, there was no objection, there should have been an  
24 objection. Now, again, whether the defense had the  
25 opportunity to review this in light of the hour in which it

1 was produced and review the transcript, is another issue.  
2 But, again, government counsel doesn't do just what  
3 government counsel can get away with doing. And I think a  
4 first-year law student would know that you can't bolster the  
5 credibility of one witness or a witness with clearly  
6 inadmissible statements.

7           And this evidence is coming in, the statements  
8 that Mr. Clemens made at this hearing, are coming in as  
9 substantive evidence; i.e. the alleged false testimony that  
10 the government is saying he gave. At this hearing  
11 Congressman Cummings is opining on his perspective regarding  
12 the credibility of Mr. Pettitte. So, now we have before the  
13 jury, not only do we have Mr. Pettitte's wife saying that  
14 Mr. Pettitte told her something consistent with what she  
15 says Mr. Clemens said, but we also have Congressman Cummings  
16 opining on his credibility that he places on Andy Pettitte.

17           So, now we've got two things before the jury that  
18 are bolstering Andy Pettitte's credibility. And in my view,  
19 he is a critical witness because obviously there's going to  
20 be serious challenge to the credibility of Mr. McNamee.  
21 That may not undermine his credibility, but I think it's a  
22 lot harder task to undermine the credibility of Andy  
23 Pettitte. And I think that task only becomes more difficult  
24 when now we have before this jury two items that  
25 inappropriately bolster his credibility. And we'll never

1 know what impact that has on how this jury ultimately  
2 decides this case when we've got a man's liberty at  
3 interest.

4 I'm very troubled by this. I mean, we have  
5 expended a lot of government money to reach this point.  
6 Government counsel should have been more cautious in what  
7 was presented to this jury to ensure that we were not in  
8 this situation. I don't see how I un-ring the bell.

9 MR. DURHAM: I think it can be done through an  
10 appropriate instruction to the jury.

11 THE COURT: I don't think so. As much as I would  
12 hate to have to go back through all four or five days again  
13 of jury selection with the limited time, the resources that  
14 this Court has and the other things I have on my calendar, I  
15 don't see how I un-ring the bell. Because in my view, based  
16 upon what I know about the case, I think Mr. Pettitte's  
17 testimony is going to be critical as to whether this man  
18 goes to prison. And I can't in good faith leave this case  
19 in a situation where a man's liberty is at risk when the  
20 government should have taken steps to ensure that we were  
21 not in this situation.

22 I'll take a short break to talk to one of my  
23 colleagues before I make the ruling.

24 [Thereupon, recess taken at 11:09 a.m., resuming  
25 at 11:50 a.m.]

1           THE COURT: I've talked to several of my  
2 colleagues. I've pondered what occurred, and at bottom,  
3 Mr. Clemens has to get a fair trial. And he has a right to  
4 have his guilt or innocence decided based upon evidence that  
5 is legally admissible. And obviously in assessing what I do  
6 in the face of the request, it's been made for a mistrial,  
7 is to try and make a determination as to the significance of  
8 Mr. Pettitte's testimony, and try and make my best estimate  
9 as to, with what has occurred, whether Mr. Clemens can get a  
10 fair trial. And I view Mr. Pettitte's testimony as critical  
11 to the government's case.

12           While obviously it could be suggested that he  
13 misunderstood what Mr. Clemens was saying, I think there  
14 are, I think it's going to be very difficult to undermine  
15 his credibility. And when you add his testimony with all of  
16 the other evidence, I think it becomes very difficult for  
17 Mr. Clemens.

18           And it only becomes more difficult for Mr. Clemens  
19 when the testimony of Andy Pettitte has been inappropriately  
20 bolstered through evidence that was presented by the  
21 government: One, in reference to the comments made by  
22 Congressman Cummings, which not only got Mr. Clemens to  
23 indicate that Andy Pettitte is an honest person, but the  
24 congressman himself to have opined, which should not have  
25 not been before the jury, his impressions of the credibility



1 of Mr. Clemens.

2           But we also have, which was a direct violation of  
3 the pretrial ruling I made in response to a motion in limine  
4 that had been filed by counsel for Mr. Clemens, and that was  
5 to keep out the testimony of Mr. Pettitte's wife in light of  
6 the fact that you'd have a prior consistent statement before  
7 the jury indicating from the wife that shortly after  
8 Mr. Clemens is supposed to have admitted his use of HGH,  
9 that Mr. Pettitte came home and told his wife that  
10 Mr. Clemens had, in fact, made that admission. It was  
11 because of in my view that would be extremely prejudicial  
12 and would unfairly bolster Mr. Pettitte's credibility  
13 absent, as I ruled, something occurring during the course of  
14 the trial that would open the door and therefore result in  
15 that evidence coming in to possibly rehabilitate  
16 Mr. Pettitte based upon what may take place or would take  
17 place during the course of cross-examination.

18           But my assessment that experienced counsel, as  
19 defense counsel is, that they would have stayed away from  
20 asking questions that would bring out this information  
21 because of the obvious impact it would have. And sadly, I  
22 have reached a conclusion that to permit this case to go  
23 forward with the government having done what it did, because  
24 it was the government's obligation, once I made my ruling,  
25 to go back, look at its evidence and make sure that the

1 information that it would be presenting to this jury did  
2 not, did not violate a clear ruling that this Court had  
3 made. And the government not having done that, and in my  
4 view having put this case in a posture where Mr. Clemens  
5 cannot now get a fair trial before this jury, I will declare  
6 a mistrial.

7 I think what we have to do at this point is assess  
8 whether the government, having precipitated this mistrial,  
9 whether the government can now retry this case or whether  
10 re-prosecution is barred by double jeopardy.

11 MR. DURHAM: Your Honor, may we have an  
12 opportunity to brief the Court's, may we now have an  
13 opportunity to brief the Court's ruling on the mistrial?

14 THE COURT: You're not going to be able to  
15 convince me. Because if this man got convicted, from my  
16 perspective, knowing how I sentence, he goes to jail. And  
17 I'm not going to, under the circumstances, when this has  
18 happened, put this man's liberty in jeopardy. He's entitled  
19 to a fair trial; in my view, he can't get it now. And that  
20 was caused by the government.

21 So, I will not give time for this matter to be  
22 briefed on that issue. I assume now we have to address the  
23 issue as to whether this case can be re-prosecuted. And  
24 I'll set a schedule for motions on whether double jeopardy  
25 bars re-prosecution at this time.

1           Mr. Hardin, how much time will you need to file  
2 your motion?

3           MR. HARDIN: Ten days.

4           THE COURT: Ten days?

5           MR. HARDIN: Whatever the Court prefers.

6           THE COURT: It's your prerogative.

7           MR. HARDIN: I think we can live with ten days,  
8 Your Honor.

9           THE COURT: Very well. I'll just make it the end  
10 of the, the 29th of July, which is a little more than ten  
11 days. I'll give the government until the 19th of August to  
12 file an opposition, and the 26th of August for the  
13 government to file a reply. Set the 2nd of September at  
14 1:30 for a hearing on the motion.

15           Let's bring the jury in.

16           MR. HARDIN: Your Honor, we're going to assume on  
17 this side of the table the gag order is still in effect?

18           THE COURT: Yes, because I don't know if the case  
19 has to be retried. If it does, I don't want a potential  
20 jury pool to be in some way tainted.

21           MR. HARDIN: Yes, sir.

22           [Thereupon, Jury enters courtroom at 12:00 p.m.]

23           THE COURT: You may be seated. Ladies and  
24 gentlemen, we have taken about a week out of your life.  
25 We've expended a lot of your taxpayer's money to reach this

1 point in this case. Unfortunately, there are rules that we  
2 play by, and those rules are designed to ensure that both  
3 parties receive a fair trial. And that is particularly true  
4 when it comes to someone who has been charged with a crime  
5 whose life and liberty, or their liberty is on the line.

6           And when a judge makes rulings regarding evidence  
7 that can or cannot be presented to the jury before the trial  
8 commences, there's an obligation on the part of the lawyers  
9 to comply with that order. Now, I had made a ruling before  
10 this trial commenced that certain evidence could not be  
11 admissible in this trial because it was my view that that  
12 evidence, without other circumstances evolving that would  
13 somehow justify that evidence coming before you, would  
14 create an environment where you would not be able to render  
15 a fair and impartial decision. Despite that ruling, the  
16 government did not take the effort that it should have taken  
17 to alter its evidence to comply with the ruling that I made.

18           As a result of that, evidence that I had excluded  
19 from this trial came before you. And as a result of that,  
20 in my view, the ability of Mr. Clemens with this jury to get  
21 a fair trial would be very difficult, if not impossible.  
22 And I, therefore, have decided very reluctantly because  
23 we've spent a lot of time and effort impaneling this jury,  
24 that because of what I just indicated, that I have to  
25 declare a mistrial and terminate these proceedings.

1           I apologize to you for what has transpired. It's  
2 unfortunate, but at bottom, in the United States of America  
3 we try to ensure that everybody who comes in to our  
4 courthouse is treated fairly and that they get a fair shake  
5 from a jury. And when a judge reaches a conclusion that  
6 there is a possibility, a distinct possibility, that  
7 information that unfairly prejudices a defendant has come  
8 before the jury, in direct violation of a ruling that the  
9 Court has made, I have no other alternative, despite the  
10 tremendous loss of time and effort and money, to terminate  
11 the proceedings.

12           So, I do thank you and I apologize for what has  
13 transpired. So, thank you for your time.

14           [Thereupon, the proceedings adjourned at  
15 12:05 p.m.]

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CERTIFICATE

I, Cathryn J. Jones, an Official Court Reporter for the United States District Court of the District of Columbia, do hereby certify that I reported, by machine shorthand, the proceedings had and testimony adduced in the above case.

I further certify that the foregoing 53 pages constitute the official transcript of said proceedings as transcribed from my machine shorthand notes.

In witness whereof, I have hereto subscribed my name, this the 14th day of July, 2011.

/s/ Cathryn J. Jones  
Cathryn J. Jones, RPR  
Official Court Reporter

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